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View From McDermott: Having Their Cake and Eating It Too—An Employer's Guide to Managing Retirement-Eligible Employees Who Want to Start Retirement Benefits and Keep Working

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"I would like to start receiving my retirement benefits now, but I would also like to keep working for a bit. Can I do this?" Baby boomers pose this question to their employers on a routine basis.

Unfortunately, there is no stock answer to this common question. The employer response depends on a variety of factors, including the types of retirement benefits payable to the employee and the arrangement under which the employee will continue providing services to the employer.

This article provides employers with a roadmap for analyzing this common employee request.

Background

The U.S. workforce is aging. In 2010, 20 percent of the U.S. workforce was age 55 or older.[1] By 2020, 25 percent of the U.S. workforce will be age 55 or older.[2] With this swell of older workers comes a surge of retirements. For the next 20 years, approximately 10,000 people each day will reach age 65, the age traditionally thought of as the "normal retirement age." However, an increasing number of baby boomers are not satisfied with the thought of retiring at age 65. Instead, many boomers want to keep working, perhaps at a reduced pace, while also receiving their retirement benefits.

At the same time, employers are increasingly focused on providing their boomer employees with the desired flexibility because it allows employers to better manage their succession/talent management plans. A typical example is the retirement-eligible employee who wants to continue working for his employer on a part-time basis but also wants to start receiving his employer-sponsored retirement benefits. If the employer cannot find a way to accommodate this employee, the employee may "retire" from his employer, commence his pension benefit, and take his knowledge and skills to another employer (possibly a competitor).

In order for an employer to determine whether it can retain a retirement-eligible employee who wishes to continue working while also commencing his employer-sponsored retirement benefits, the employer should first examine two threshold questions:

1. Does the employee have to retire in order to begin receiving retirement benefits?

2. If the employee must retire in order to begin receiving retirement benefits, is there a way for the employer to rehire or reengage the retiree?

Necessity of Retirement

When advising a retirement-eligible employee of his retirement benefit options, an employer should first determine whether actual retirement is necessary in order for the employee to commence receipt of benefits under a given plan. The answer often depends on the type of retirement plan. Defined contribution plans, defined benefit pension plans and nonqualified plans all have different rules.

[1] Bureau of Labor Statistics, *available at* http://www.bls.gov/news.release/ecopro.t01.htm (last visited Apr. 15, 2014).

[2] *Id.*

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Defined Contribution Plans. Defined contribution plans often include in-service distribution options that allow participants to withdraw all or a portion of their account balances prior to retirement. Following is a summary of these in-service withdrawal options:

■ *Age 59½ Withdrawal*. Many employer plans allow a participant to request an in-service withdrawal of his 401(k) contributions once he reaches age 59½.[3] Some employer plans also extend this age 59½ in-service withdrawal right to matching and profit-sharing contributions. These distributions will be subject to regular income tax, but exempt from the additional 10 percent excise tax applicable to many distributions prior to that age.[4]

■ *Two-Year/Five-Year Rule*. Some employer plans allow a participant to request an in-service withdrawal of any non-safe harbor matching and profit-sharing contributions that have been in the plan for at least two years. Alternatively, if the employee has been a participant in the plan for at least five years, he may request an in-service withdrawal of *all* non-safe harbor matching and profit-sharing contributions attributable to his account (*i.e.*, even if held in the plan for less than five years).[5] So long as the participant is age 59½ when he receives the distribution, this distribution will be subject to regular income tax, but exempt from the additional 10 percent excise tax.[6]

■ *Rollover Contributions*. Many employer plans allow a participant to request an in-service withdrawal of his rollover contributions to the plan at any time.[7] So long as the participant is age 59½ when he receives the distribution, this distribution will be subject to regular income tax, but exempt from the additional 10 percent excise tax.[8]

■ *After-Tax Contributions*. Many employer plans allow a participant to request an in-service withdrawal of his after-tax contributions (if any) at any time. With respect to a distribution of after-tax contributions, only the earnings on such contributions will be subject to regular income tax (and potentially subject to the additional 10 percent excise tax for actively-employed participants under age 59½).[9]

An employee who would like to keep working but is also keen to start receiving his employer-sponsored retirement benefits may be satisfied with the in-service withdrawal options described above. However, note that the tax code does not *require* an employer's plan to include any of these in-service withdrawal options. Therefore, an employer should carefully review its defined contribution plan document to determine the availability of these in-service withdrawal options under its plan prior to conveying these options to employees. An employer can also add these in-service withdrawal options to its plan on a prospective basis.

Defined Benefit Plans. If an employer sponsors a defined benefit pension plan, its retirement-eligible employees are often eager to commence pension benefits as soon as possible, even if they are still working. This eagerness is especially prevalent amongst employers that sponsor pension plans with a lump-sum distribution option. Many employees at or near retirement age are eager to receive immediate lump-sum distributions because today's relatively low interest rates produce larger lump-sum benefits. Further, many employees at companies that sponsor these types of plans are acutely aware of the time (typically once a year) when the plan resets the interest rate, and participants may aim to retire either right before or right after the time the rate is reset. Unfortunately, with respect to in-service withdrawal options, defined benefit pension plans are inherently less flexible than defined contribution plans.

In accordance with tax code requirements, defined benefit plans typically cannot pay benefits until the participant terminates employment or retires.[10] Prior to the Pension Protection Act of 2006 (PPA), employers could define retirement as they wished (*e.g.*, completion of 30 years of service), which allowed relatively young participants (*e.g.*, age 50) to commence pension benefits while continuing in service.

The PPA revised the tax code to provide that the minimum retirement age for this purpose was 62. However, the PPA also attempted to provide employers with additional flexibility by revising the tax code to permit in-service pension plan distributions to participants who have reached age 62.[11] The Internal Revenue Service has yet to address numerous administrative issues surrounding this new in-service withdrawal right and this feature has not gained much traction amongst plan sponsors. Therefore, unless the employer took the rare step of actively amending its defined benefit pension plan to permit in-service pension distributions at age 62, the employer should reasonably conclude that a retirement-eligible employee must actually terminate employment (*i.e.*, retire) in order to commence his pension benefits.

Nonqualified Plans. Under tax code Section 409A and the accompanying IRS regulations, one of several permissible distribution triggers for a nonqualified plan is upon a participant's ''separation from service.''[12] The IRS regulations define ''separation from service'' very strictly.[13] For nonqualified plans, the IRS regulations create a rebuttable presumption that the employee (A) *will separate from service* as of a certain date if the employer and the employee reasonably anticipate that on

[3] I.R.C. § 401(k)(2)(B)(i)(III).
[4] I.R.C. § 72(t)(2)(A)(i).
[5] Treas. Reg. § 1.401-1(b)(1)(ii); Rev. Rul. 68-24.
[6] I.R.C. § 72(t)(2)(A)(i).
[7] Rev. Rul. 2004-12.
[8] I.R.C. § 72(t)(2)(A)(i).
[9] I.R.C. § 72(t)(2)(A)(i). Please note that the term ''after-tax contributions'' refers to traditional after-tax contributions, not Roth 401(k) contributions. Special rules, beyond the scope of this article, apply to the withdrawal of Roth 401(k) contributions.

[10] *See, e.g.*, Treas. Reg. § 1.401(a)-1(b)(1)(i) (explaining that a qualified pension plan must pay benefits only upon retirement unless a plan specifically provides for phased retirement).
[11] I.R.C. § 401(a)(36). Prior to the PPA, the IRS issued proposed regulations presenting other phased retirement options. Under these proposed regulations, a plan could provide for in-service distributions starting as early as age 59½ if such distributions were made pursuant to a ''bona fide phased retirement program.'' A bona fide phased retirement program required an employee to reduce his hours worked in exchange for a pro rata portion of his benefit. Plan sponsors are not entitled to rely on these proposed regulations. *See* Prop. Treas. Reg. § 1.401(a)-3, 69 Fed. Reg. 65108 (Nov. 10, 2004).
[12] I.R.C. § 409A(a)(2)(A)(i); Treas. Reg. § 1.409A-3(a).
[13] Treas. Reg. § 1.409A-1(h).

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such date the employee's level of services will drop to 20 percent or less of the average level of services provided by the employee to the employer over the immediately preceding 36-month period, and (B) *will not separate from service* as of a certain date if the employer and the employee reasonably anticipate that on such date the employee's level of services will be 50 percent or more of the average level of services provided by the employee to the employer over the immediately preceding 36-month period.[14] Therefore, if there is any anticipation that an employee will continue providing services to his employer, even in a reduced capacity that is greater than 20 percent of his average level of services, the employer must be able to describe the facts and circumstances supporting the conclusion that a separation from service has occurred (particularly if the employee will be working more than 50 percent of his historic work load and the IRS regulations presume that there is no ''separation from service'').

In addition, please note that some employers drafted their nonqualified plans to exclude the rebuttable presumption concept. Instead, these nonqualified plans simply state that a ''separation from service'' will occur as of a certain date if the employer and the employee reasonably anticipate that on such date the employee's level of services will drop to 20 percent[15] or less of the average level of services provided by the employee to the employer over the immediately preceding 36-month period.[16] An employer considering reliance on the rebuttable presumption concept should carefully review its nonqualified plan document to ensure that it does not include a more stringent threshold.

Because in-service distribution options under defined benefit pension plans and nonqualified plans are limited, a retirement-eligible employee often decides to formally retire and commence receipt of all employer-sponsored retirement benefits. (Given the unsecured nature of nonqualified plans, certain employees may be particularly interested in commencing those benefits.) Because many employees who choose formal retirement still wish to continue working for their employer in some capacity, the following sections discuss possible methods for the employer to rehire or reengage its retiree.

Retirement Required; Rehire Preferred

An employer may decide to rehire a retiree for a variety of reasons. Sometimes the retiree decides that he is not quite ready to stop working, and wishes to continue working for the employer in a more limited capacity. In other instances, the employer actively seeks to rehire the retiree because the retiree can provide valuable transition and support services for the employer. While these arrangements are mutually beneficial, they present a host of legal and tax considerations for both parties. For example, how will this rehire impact the retiree's benefits under the employer's tax-qualified retirement plan? Are there different considerations if the retiree is entitled to benefits under the employer's nonqualified retirement plan? This section discusses these complex considerations.

In order to determine how the retiree's rehire will impact his employer-sponsored retirement benefits, the employer must first determine whether the retiree already started receiving any of his employer-sponsored retirement benefits. For example, did the retiree already take a lump sum distribution from the employer's defined contribution 401(k) plan? Or did the retiree already commence receipt of any monthly pension benefits?[17]

If the retiree has *not* started receiving his employer-sponsored retirement benefits, there are few benefits-related legal issues with the employer rehiring the retiree. The retiree will likely be prohibited from receiving his employer-sponsored retirement benefits for the duration of his reemployment, but these benefits will be immediately available to him upon his second ''retirement.''

If the retiree has already started receiving his employer-sponsored retirement benefits, there are multiple legal and tax issues associated with the employee's reemployment. These issues are discussed in more detail below. This discussion is further broken down between qualified and nonqualified retirement plan benefits because there are significant differences in the IRS rules governing these two types of retirement plans.

Retiree Already Receiving Qualified Retirement Plan Benefits

In the qualified retirement plan context, there are two primary issues with a retiree's rehire if the retiree already started receiving his employer-sponsored retirement benefits. First, employers must appreciate the possibility that the IRS *may* view the retiree's termination and subsequent rehire as a ''sham termination'' allowing for the retiree's early commencement of his retirement plan benefits (particularly if an in-service distribution option was not available under the plan at issue). Second, if the retiree is receiving monthly pension benefits, employers must be aware that a rehire can result in a mandatory suspension of monthly payments. Both of these issues are described in more detail below. Please note that individual plan design features may also give rise to other issues; employers should work closely with legal counsel to identify and address any additional issues.

Sham Terminations. A recent retiree typically is eligible for distribution of employer-sponsored 401(k) benefits, as well as commencement of any employer-

[14] Treas. Reg. § 1.409A-1(h)(ii) (also explaining that ''a plan may treat another level of reasonably anticipated permanent reduction in the level of bona fide services as a separation from service, provided that the level of reduction required must be designated in writing as a specific percentage, and the reasonably anticipated reduced level of bona fide services must be greater than 20 percent but less that 50 percent of the average level of bona fide services provided in the immediately preceding 36 months'').

[15] Applicable Treasury Regulations allow an employer to pick any percentage greater than 20 percent and less than 50 percent. *See id*.

[16] *Id.*

[17] If the employer sponsors a retiree medical plan, the retiree's eligibility for the retiree medical plan may also be compromised by his or her reengagement with the employer. For example, some retiree medical plans provide coverage only to employees who terminate employment on or before a certain date. Retiree medical plans are outside the scope of this article, but employers should be cognizant of this potential issue and consult with legal counsel as necessary.

sponsored pension benefits. This potential influx of income is so attractive that some employees consider retiring simply to gain access to this retirement income, with the idea that they will return to work with their former employers shortly thereafter. However, the IRS caught on to these ''sham terminations'' long ago and generally requires that an employee have a *bona fide* separation from employment in order to receive a distribution from a qualified retirement plan.[18] In fact, a payment from a qualified retirement plan in the absence of a legitimate or *bona fide* separation from employment threatens the tax-qualified status of the entire qualified plan that makes the illegitimate payment.[19] Therefore, it is important that employers recognize the characteristics of a sham termination and take any measures necessary to prevent its employees from engaging in these terminations.

In general, neither the tax code nor the IRS has clearly delineated the nature of a *bona fide* separation of employment for purposes of a distribution from a tax-qualified retirement plan, and the IRS's assessment of a *bona fide* separation from service in this context is made on a facts and circumstances basis. Although there are no bright-line rules, IRS guidance does suggest the following four factors will be considered in assessing whether an employee's termination and subsequent rehire were valid.

■ *Mutual Understanding*. Perhaps the most important factor in determining the legitimacy of a rehire situation is whether there were any written, oral or ''understood'' promises or commitments on the part of the employer that the employee would be rehired. Evidence of such an understanding, promise or commitment would significantly undermine the validity of the separation from service. Although the employer may believe at the time of an employee's termination that it might have a future need for the employee's services, an ''understanding'' of a planned reemployment must be avoided.[20]

■ *Timing*. The timing of the reemployment of a terminated employee, while not necessarily determinative, can create some difficult ''optics.'' The reemployment of an employee after a significant period of time following the employee's employment termination could make the initial service separation appear more valid. Conversely, the IRS may be more willing to question whether an employee separated from employment if the employee is rehired after a period of time equal to the employee's unused vacation time.[21]

■ *Termination Notice*. The validity of a separation from service is strengthened by a written termination notice. Such a notice should include language to the effect that the employee understands that the employer is under no obligation to rehire the employee should he apply for reemployment and that the departing employee is under no obligation to return to work should the employer make an offer of reemployment.

■ *Different Job Description as Rehired Employee*. If an employee is rehired, the legitimacy of the prior separation from service is strengthened if the employee's job upon rehire is different from his original job. To distinguish the later employment, the rehired individual might return only for a specified period of limited duration, only to accomplish a special project, only on a part-time basis, only with a change of title, or only with new employment responsibilities.

In the absence of a bright-line test, an employer that generally permits the rehire of retirees should consider adopting a written rehire policy for use across its entire controlled group. This written rehire policy will help the employer and its fellow controlled group members avoid situations that may be construed as sham terminations. Some employer policies even include a complete ban on rehires for any reason for a given time period (*e.g.*, six months) to better avoid situations that may be construed as sham terminations.

Suspension of Benefits. If an employer sponsors a defined benefit pension plan, it should also be cognizant of how its plan applies the suspension of benefit rules. Although pension plans are not required to suspend benefits upon a retiree's reemployment, historically, many plans have done so. Pursuant to Department of Labor regulations, pension plan documents are required to include specific rules describing if and when the employer will ''suspend'' monthly pension payments upon a retiree's return to work for that employer.[22] For example, the plan must stipulate the number of hours or days that a retiree must work in a given month in order for the suspension to be effective for a given month (e.g., 40 or more hours a month). Because the suspension of benefits rules are highly technical, this article will not discuss these rules in detail. However, it is important for employers to note the following two points:

■ *Know the Plan Terms*. An employer must review and understand its plan terms applicable to suspension of benefits upon reemployment. Historically, employers often drafted their defined benefit pension plans to suspend pension benefits upon reemployment, in order to avoid the employee's receipt of both a pension check and a paycheck. However, every plan is different and the employer must thoroughly review the rules in its plan document. Once the employer reviews these plan terms, it is also prudent for the employer to confirm that the administration of these rules matches the plan document and that these rules are correctly described in the plan's summary plan description.

■ *Understand the Impact*. If the plan provides for suspension of benefits upon a retiree's reemployment, it is important for the retiree to understand that he will lose access to monthly pension payments while reemployed. If the individual is working fewer hours for a smaller salary, this suspension could create a significant financial issue for the retiree.

Retiree Already Receiving Nonqualified Retirement Plan Benefits

Unlike qualified defined benefit pension plans, there are no suspension of benefits rules applicable to non-

[18] *See, e.g.,* Treas. Reg. § 1.401(a)-1(b)(1)(i) (explaining that a qualified pension plan must pay benefits only upon retirement unless a plan specifically provides for phased retirement); Priv. Ltr. Rul. 201147038 (Apr. 20, 2010).

[19] *Id.*

[20] Priv. Ltr. Rul. 201147038.

[21] *Id.*

[22] 29 CFR § 2530.203-3 (2013).

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qualified plans. So, if the retiree's nonqualified benefits properly started prior to the retiree's reemployment, a suspension of benefits is not required or permitted.

In the nonqualified plan context, the primary issue with a retiree's rehire is the appearance of a sham termination. Once again, if the retiree already received his nonqualified plan benefits, employers must be cognizant of the possibility that the IRS will view the retiree's termination and subsequent rehire as a ''sham termination'' allowing for the retiree's early commencement of his nonqualified plan benefits. A nonqualified plan distribution in the absence of a legitimate ''separation from service'' constitutes a Section 409A violation, resulting in severe tax consequences to the participant (including a 20 percent excise tax payable by the participant on the value of the entire nonqualified plan benefit) and potential underreporting penalties for the employer.[23] As a result, it is critical to determine the level of services the reemployed participant will be providing.

As discussed above, a legitimate ''separation from service'' under Section 409A generally requires an anticipated reduction in services to at least 50 percent and ideally 20 percent or less of the employee's prior average service level. Although this rule seems sufficiently ''black and white,'' it can be difficult to apply in practice. IRS regulations specify that the following two factors should be considered in determining whether a ''separation from service'' has occurred that would permit a distribution from a nonqualified retirement plan.

■ *Mutual Understandings.* Were there any written, oral or ''understood'' promises or commitments on the part of the employer that the employee would be rehired as an employee to perform services at a level in excess of 20 percent of his prior average level of services? Under the IRS regulations, evidence of such an understanding, promise or commitment would nullify the separation from service, and the employee would be treated as continuing in service. If the employer believes at the time of an employee's termination that it might have a future need for the employee's services, it should arrange for the employee's provision of these services at a rate of 20 percent (or less) of the prior rate. Any ''understanding'' of a planned reemployment must be avoided.

■ *Change in Circumstances.* The IRS regulations do provide flexibility for rehire of a former employee in the event of an unanticipated change in circumstances. For example, if an employer's former CFO retires, and the new CFO leaves unexpectedly, the employer could rehire the former CFO without running afoul of Section 409A's requirements for a separation from service. The IRS regulations provide the following example:

> ''For example, an employee may demonstrate that the employer and employee reasonably anticipated that the employee would cease providing services, but that, after the original cessation of services, business circumstances such as termination of the employee's replacement caused the employee to return to employment.''[24]

However, as described above in more detail, the employee and the employer can never plan or anticipate such change in circumstances.

[23] I.R.C. § 409A(a)(1).
[24] Treas. Reg. § 1.409A-1(h)(ii).

Rehired Employee v. Independent Contractor

Thus far, this article has assumed that an employer will rehire a retiree as a ''rehired employee.'' This term describes an individual who worked for an employer, terminated employment with that employer and is subsequently rehired by that employer as a W-2 employee.

However, employers sometimes seek to reengage retirees as independent contractors, often with the hope that this change in status will provide the retiree with more flexibility to commence and continue receiving his employer-sponsored retirement benefits. The term ''independent contractor'' is more opaque. The term typically describes an individual who is providing services for an employer without being under the direction and control of that employer. Because this individual is not an employee, the employer reports the individual's compensation on IRS Form 1099-MISC, and is therefore spared the additional tax obligations associated with employee wages, such as wage withholding and reporting and employment tax obligations. For these tax reasons alone, reengagement of a retiree as an independent contractor often seems like an appealing option to both retirees and employers. However, reengagement as an independent contractor only makes sense to the extent that the independent contractor characterization is valid under the IRS guidelines used to determine worker status. The employer will incur significant legal risk for employment taxes and other employee benefits if the duties performed as an independent contractor make the arrangement look more like an employment relationship.

Whether an individual is performing services for an employer as an employee or an independent contractor is a facts and circumstances determination.[25] The tests for distinguishing employees from independent contractors are murky, but independent contractor status will be difficult to substantiate if an individual's duties are much the same as those of other employees or those previously performed by the independent contractor as an employee. According to current IRS guidelines, an individual is an independent contractor if the employer has the right to control or direct only the result of the work, and not what will be done and how it will be done.[26] In determining whether an individual has the requisite amount of control and independence over his work, the IRS will look at a variety of factors in three categories: (i) behavioral, (ii) financial and (iii) type of relationship.[27] According to the IRS website, there is no ''magic'' or set number of factors that ''makes'' the worker an employee or an independent contractor, and no one factor stands alone in making this determination.[28]

Independent contractor status is often difficult to substantiate and employers should work with legal counsel to develop a customized written independent contractor policy. This policy should include tailored independent contractor guidelines, based on the employ-

[25] Internal Revenue Service, *Independent Contractor (Self-Employed) or Employee?*, *available at* http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Self-Employed-or-Employee (last visited Apr. 15, 2014).
[26] *Id.*
[27] *Id.*
[28] *Id.*

er's needs, practices and risk tolerance. In addition, please note that an employer may increase its risk of an IRS audit if it issues both a Form W-2 and a Form 1099-MISC to the same individual for the same calendar year. In order to mitigate against this heightened level of risk, some employers implement a strict reengagement policy, under which they will not reengage former employees as independent contractors under any circumstances unless a specified period of time has passed (*e.g.*, six months).

Return as Independent Contractor and Retirement Plan Impacts

If a retiree's former employer reengages the retiree as an independent contractor, there are few practical impacts on the retiree's qualified retirement plan benefits. Typically, the retiree may start receiving his employer-sponsored retirement benefits upon his termination from employment, even if he knows that he will continue providing services for his employer as an independent contractor. Reengagement as an independent contractor, however, has significant implications for any nonqualified retirement plan benefits.

No Impact on Qualified Retirement Plan Benefits. With respect to an employee's transition to a valid independent contractor role, IRS guidance does not strictly prohibit a distribution from the employer's qualified retirement plan if an employee becomes an independent contractor (because the individual would no longer be a common law employee receiving income reportable on Form W-2). However, the employer engaging the independent contractor must carefully analyze the independent contractor arrangement to ensure that the arrangement meets IRS requirements and constitutes a *bona fide* separation from service. Assuming the employee transitions to a valid independent contractor role, the employer can deem the employee to be ''separated'' from service and process any distributions from the employer's qualified retirement plans payable upon a separation from service. Moreover, if an employer reengages a retiree as an independent contractor at a later date, this subsequent provision of services will have no impact on the retiree's employer-sponsored retirement benefits.

Impact on Nonqualified Retirement Plan Benefits. The same nonqualified ''separation from service'' definition applies regardless of whether the individual is rehired as an employee or reengaged as an independent contractor. In other words, for nonqualified plans, the IRS regulations specify that an employee will separate from service as of a certain date if the employer and the employee reasonably anticipate that the employee's level of service either as an employee *or as an independent contractor* will drop to 20 percent or less of the average level of services provided by the employee to the employer over the immediately preceding 36-month period.[29] Therefore, if there is any anticipation that an employee will continue to provide services to an employer as an independent contractor at a rate greater than 20 percent of his average level of services, then there likely is no ''separation from service.'' Given these requirements, a nonqualified retirement plan distribution in the absence of a legitimate ''separation from service'' would constitute a Section 409A violation, resulting in severe tax consequences to the participant and potential underreporting penalties for the employer.

Conclusion

Many employers strive to accommodate their boomer employees' requests to commence employer-sponsored retirement benefits while also continuing to work. When considering this request, an employer should first examine two threshold questions:

1. Does the employee have to retire in order to begin receiving retirement benefits?

2. If the employee must retire in order to begin receiving retirement benefits, is there a way for the employer to rehire or reengage the retiree?

These determinations are highly fact-specific. Once the employer conducts a careful analysis, it may determine that its plans already support the type of arrangement requested by the employee. Prior to making any promises to employees, the employer should also confirm its conclusions with legal counsel. Legal counsel can also assist the employer in drafting a tailored policy outlining the employer's position on these retirement benefit requests.

[29] Treas. Reg. § 1.409A-1(h)(ii).

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